

Appeals from a decision of the Nevada State Office, Bureau of Land Management, to remove 1,400 wild horses from the Reveille Grazing Allotment.

Dismissed.

1. Wild Free-Roaming Horses and Burros Act--Rules of Practice: Appeals: Dismissal

Where, pursuant to a Federal District Court order, BLM issues a decision establishing an optimum number of wild horses for a grazing allotment and appeals are filed challenging BLM's determination of that optimum number, but during the pendency of those appeals, the Federal District Court issues another order expressly directing the Secretary to remove wild horses from the allotment in excess of that optimum number and thereby judicially approving that optimum number, the appeals will be dismissed as moot.

APPEARANCES: Craig C. Downer, Minden, Nevada, pro se; Nancy Whitaker, Sacramento, California, for Animal Protection Institute of America; Dawn Y. Lappin, Reno, Nevada, for Wild Horse Organized Assistance, Inc.; Donald A. Molde, Reno, Nevada, pro se; T.J. Mullinax, Las Vegas, Nevada, pro se; Nan Sherwood, Davis, California, pro se; Steve Johnson, Tuscon, Arizona, for Defenders of Wildlife; Burton J. Stanley, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Craig C. Downer, Donald A. Molde, T. J. Mullinax, Nan Sherwood, the Animal Protection Institute of America (APIA), Defenders of Wildlife, and the Wild Horse Organized Assistance, Inc. (WHOA), filed timely appeals from a December 12, 1986, decision of the Nevada State Office, Bureau of Land Management (BLM), to remove 1,400 wild horses from the Reveille Grazing Allotment in Nevada. 1/

1/ In a letter dated Sept. 28, 1988, Nan Sherwood requested that the Board "remove my name as an interested party." We consider that letter to be a withdrawal of her appeal, and her appeal is, accordingly, dismissed.

By order entered on November 28, 1986, the United States District Court for the District of Nevada had previously directed the Secretary of the Interior, through BLM, to remove from the Reveille Grazing Allotment all wild horses in excess of an "optimum number," to be determined by BLM. The order also required BLM to manage horses only on that part of the Reveille Grazing Allotment which the court determined was occupied by wild horses on December 15, 1971 (referred to below as the Horse Management Area or HMA). Fallini v. Hodel, No. R-85-535 BRT (D. Nev. Nov. 28, 1986). On December 1, 1986, BLM informed the court that it had determined the optimum number of horses to be between 145 and 165.

BLM informed various groups and individuals by letter of its plan to gather approximately 1,400 "excess" wild horses from the Reveille Grazing Allotment. Approximately 145 horses were to remain on the HMA. BLM stated that the decision was made in order to comply with the court's order. Downer and the other individuals and groups each filed an appeal of that action. The Board consolidated all the appeals under docket No. IBLA 87-223.

On January 14, 1987, BLM filed a motion with this Board to put the gather decision into full force and effect, pursuant to 43 CFR 4.21(a), citing the court's order requiring it to remove excess wild horses by March 1, 1987. Also on January 14, 1987, BLM approved the final Reveille Gather Plan and Record of Decision. On January 15, 1987, this Board issued an order granting the BLM motion to put the gather plan into full force and effect and BLM proceeded to implement the plan.

On November 13, 1987, the United States District Court issued a supplementary order, in response to a stipulation by the parties, providing that the Reveille Horse Management Area, as defined by the court,

will be managed for a population of between 145 and 165 horses. * * * An accurate annual census of the whole of the Reveille Allotment shall be taken by the defendants. * * * Should a population of over 165 horses be determined to exist within the whole of the Reveille Allotment, the defendants shall remove the excess horses within 120 days.

(Order of Nov. 13, 1987, at 3).

On June 27, 1988, APIA filed with this Board an inquiry as to the status of IBLA 87-223 and enclosed various documents. On July 19, 1988, the Board issued an order requiring from BLM "information regarding the gather and any subsequent events which would be relevant in adjudicating the appeals docketed as IBLA 87-223." 2/ BLM filed that information on

2/ Our order of July 19 also completed service of APIA's filing, as there was no indication that APIA had served its inquiry on the other parties, as required by 43 CFR 4.22.

September 23, 1988. Therein, BLM stated that it had developed a new gathering plan in June and July of 1988, the Reveille Grazing Allotment portion of which provided for removal of 225 excess wild horses. BLM September 23, 1988, Filing, Attachment 15 at 2.

On September 29, 1988, APIA filed a Motion for Stay requesting that this Board direct the Nevada State Office to halt a wild horse roundup in the Reveille Grazing Allotment allegedly scheduled to begin October 3-4, 1988. By order dated September 30, 1988, the Board denied that motion. 3/

Appellants state various objections to the BLM decision to gather. Appellant Downer asserts in his Notice of Appeal that 145 is not an adequate population to ensure genetic viability of the herd; various inadequacies in the U.S. District Court orders justify their re-examination; BLM should not use statistics compiled by the Nevada Department of Wildlife to estimate the wild horse population; public input pursuant to 43 U.S.C. § 1739 (1982), was inadequate; and an environmental impact statement (EIS) was required, in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370 (1982).

APIA requests that the Board "intervene to restore legal protections granted to wild horses and the authority of the Secretary to regulate and manage the use of the range" (APIA Notice of Appeal at 1). In addition, APIA asserts that there has been only a limited amount of damage to the range and that the damage is caused not by horses but by the tendency of cattle to gather around watering holes.

WHOA asserts that by ignoring the impacts to horses and failing to elicit adequate public comment BLM failed to comply with NEPA. Defenders of Wildlife argues that there are several flaws in the District Court's November 28, 1986, order, while T. J. Mullinax questions the use of the

3/ The motion was denied both because APIA's appeal of the gather plan did not relate to the Reveille Grazing Allotment and because BLM's gather plan appeared to be in direct response to the court order. As set forth in our Sept. 30 order:

"The documents provided by BLM show that, as to wild horse population levels in the Reveille Allotment, BLM is operating in accordance with procedures approved by the U.S. District Court. In that regard, BLM developed a new gathering plan in June-July 1988, the Reveille Allotment portion of which provided for removal of 225 excess wild horses. BLM September 23, 1988, Filing, Attachment 15 at 2. Although APIA filed an appeal of the gathering plan, its appeal did not relate to the Reveille Allotment. BLM September 23, 1988, Filing, Attachment 19. However, even if APIA had appealed, presumably BLM would have come forward as it previously did to request that its authority to gather horses from the Reveille Allotment be continued pending action by us on the appeal. In such a situation, we would have been disposed to do so. APIA's present motion has no basis and must be denied."

Nevada Department of Wildlife's estimate of the horse population and suggests that the number of cattle be reduced in order to alleviate range over use.

It is clear from various of these arguments raised by appellants that they would like this Board to review the propriety of the U.S. District Court's orders relating to removal of wild horses within the Reveille Grazing Allotment. Pursuant to 43 CFR 4.1, this Board, as a component of the Office of Hearings and Appeals, "is an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department." The Secretary of the Interior has no authority to review a U.S. District Court order and consequently, this Board is without that authority as well. Therefore, to the extent that appellants urge the Board to review or reverse the U.S. District Court's orders, we are without jurisdiction to do so.

[1] Furthermore, to the extent that appellants request this Board to reverse BLM's decision which complies with those orders, we find that we lack the authority under the law to take that action. 28 U.S.C | 1361 (1982) provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." In its supplemental order dated November 13, 1987, the District Court expressly directed the Secretary to remove wild horses in excess of 165 from the Reveille Grazing Allotment. That directive represented judicial approval of the optimum number of wild horses, as established by BLM. The Secretary and BLM are required to adhere to the court's dictates. Thus, this Board, as a representative of the Secretary, is without authority to find that 145 to 165 is not the optimum number of horses; to decide that cattle population rather than wild horse population should be reduced; or to restore the "authority of the Secretary to regulate and manage the use of the range." 4/

For the above-stated reasons, appellants' appeals must be dismissed as moot. 5/

Even if we were to review the merits of these appeals, we would conclude that appellants failed to show that BLM erred in its conclusion that no EIS was required. This Board has consistently held that:

4/ Further, we note that in its Nov. 28, 1986, order the District Court found that "[t]here has been sufficient public comment and data collection to determine this population level forthwith" (Conclusion of Law 11, at 19). Thus, the Court has already concluded that the public's right to comment under NEPA and other applicable statutes has been satisfied.

5/ Given our disposition of these appeals, we need not determine whether all the appellants had standing to appeal the BLM decision.

A decision that a proposed action does not require preparation of an EIS will be affirmed if it appears to have been made by an authorized officer, in good faith, based upon a proper and sufficient environmental analysis record compiled in accordance with established procedures, and is the reasonable result of his study of such a record.

Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 26, 94 I.D. 35, 40 (1987).

A review of the environmental assessment (EA) shows that BLM did not, as alleged, ignore the impacts of the gather on horses. The EA contains an explanation of the effects of the gather on the wild horses. ^{6/} As "[m]ere differences of opinion provide no basis for reversal if BLM's decision is reasonable and is supported by the record on appeal" (Idaho Natural Resources Legal Foundation, Inc., *supra* at 26, 94 I.D. at 40), there would be no grounds for concluding that BLM was incorrect in its determination that an EIS was unnecessary.

In addition, although appellants Downer and Mullinax urge that BLM should not have been allowed to use the Nevada Department of Wildlife's wild horse population estimate in formulating its gather plan because of that agency's alleged bias against wild horses, the record does not support such a charge. Moreover, they failed to show that, even if such bias existed, the use of that estimate improperly influenced BLM's decision.

BLM's November 1986 census of horses in the Reveille Grazing Allotment found 976 horses. However, according to the Gather Plan at page 1, "[a]dditional horses were known to inhabit areas within the allotment that were not censused * * *." Consequently, BLM utilized the Nevada agency's figures to estimate the horse population. Significantly, on June 24 and 25, 1988, after the implementation of the gather plan at issue, BLM conducted its own census and found wild horses in excess of the court ordered management

^{6/} The Record of Decision at page 6 states:

"The proposed action would result in the removal of approximately 1400 horses, a total removal in many areas. Impacts in the form of injuries to individual horses may occur as a result of the gather, but have been minor in the past. Death loss is possible, but is not expected to exceed 2% of the horses captured. A change in lifestyle will occur for those horses captured. During the gather foals will be captured with the wet mares. When shipping horses, attempts will be made to ship wet mares in the same load with their foals, although they will be shipped in a separate compartment for the safety of the foal. This procedure has been known to orphan foals in the past and will probably do so during this gather. Foals should be old enough however to easily survive the weaning process. 145 to 165 horses will be managed for within the Reveille HMA (Court Ordered HMA). These horses will occupy the area as they do presently, resulting in impacts currently observed. These horses will occasionally move outside of the HMA, thus necessitating future removals." (Emphasis in original).

number. 7/ Presumably, if the Nevada Department of Wildlife's alleged bias had seriously affected the size of the gather in 1987, the 1988 wild horse census would not show horse numbers well in excess of the court ordered management population.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals are dismissed.

Bruce R. Harris

Administrative Judge

I concur:

David L. Hughes
Administrative Judge

7/ BLM's count found 370 horses on the whole of the Reveille Grazing Allotment and 201 within the Reveille HMA. Based on this census, BLM proceeded to plan and conduct its 1988 gather, in accordance with the District Court's Nov. 13, 1987, order.